SIXTH DISTRICT COURT OF APPEAL
STATE OF FLORIDA

Case No. 6D23-201
Lower Tribunal No. 2020DR-001084

CHRISTINA J. REESE,

Appellant,

v.

WILLIAM REESE,

Appellee.

Appeal from the Circuit Court for Polk County.
Kelly P. Butz, Judge.

May 12, 2023

MIZE, J.

This appeal arises from a dissolution of marriage proceeding between Appellant, Christina Reese ("Former Wife"), and Appellee, William Reese ("Former Husband").[1] Former Wife raises seven issues on appeal. We affirm in part, reverse

[1] This case was transferred from the Second District Court of Appeal to this Court on January 1, 2023.

in part, and remand this case to the trial court for further proceedings consistent with this opinion.

Proceedings Below

Former Husband filed a Petition for Dissolution of Marriage on February 10, 2020. Former Wife responded with an Answer and Counter-Petition for Dissolution of Marriage. Former Wife was represented by her first attorney in the proceedings below from April 24, 2020 until March 29, 2021, when she filed a Joint Stipulation for Substitution of Counsel allowing her first attorney to withdraw and her second attorney to substitute in as her attorney of record. On June 14, 2021, Former Wife's second attorney filed a Motion to Withdraw as Counsel of Record, citing Former Wife's inability to fulfill her retainer agreement.

On June 17, 2021, the trial court held a case management conference. At the case management conference, the trial court heard the Motion to Withdraw filed by Former Wife's second attorney. Former Wife consented to her counsel's withdrawal and the trial court orally granted the motion.[2] After hearing the Motion to Withdraw, the trial court continued with the case management conference. During the conference, Former Husband and Former Wife both agreed to a trial date of September 13, 2021, and so the trial court scheduled the trial for that date. The trial

[2] The trial court followed up the oral ruling with a written order granting the Motion to Withdraw on June 18, 2021.

court also orally set pre-trial compliance deadlines. At no time during the case management conference did Former Wife request a different trial date or indicate that she needed additional time to obtain a new lawyer or prepare for trial. On June 23, 2021, the trial court entered a Uniform Order Setting Final Hearing and Pretrial Conference which put in place the pre-trial compliance deadlines discussed orally at the case management conference and set the trial date for September 13, 2021.

On July 9, 2021, Former Wife's third attorney filed a Notice of Appearance and a Motion for Continuance of a mediation that was scheduled to take place on July 13, 2021. The Motion for Continuance was not signed by Former Wife as required by Family Law Rule of Procedure 12.460 and Florida Rule of General Practice and Judicial Administration 2.545(e). The Motion for Continuance pertained to the mediation, not the trial.

On July 12, 2021, Former Wife's Third Attorney filed a Motion to Allow Counsel to Withdraw, seeking to withdraw due to having insufficient time to prepare her case for trial. Former Wife signed a written consent to her counsel's motion. The trial court granted the motion that same day.

On July 15, 2021, the Court held a pre-trial conference. At the conference, Former Wife made an *ore tenus* motion to continue the trial, citing insufficient time to prepare for trial. The trial court denied the motion at the hearing and kept the trial

scheduled for September 13, 2021. The trial court entered a written order memorializing that ruling on July 22, 2021.

Sixty days elapsed between the pre-trial conference and the trial on September 13, 2021. At the trial, Former Wife made another oral motion for continuance. The trial court orally denied the motion, noting that "wife has had plenty of time to obtain counsel." The trial court also noted that "throughout the course of the proceedings this has been delayed getting to trial based on the wife's failure to cooperate."

Following the trial, the trial court entered a Final Judgment of Dissolution of Marriage. This appeal followed.

The Trial Court's Denial of the Motions to Continue

Former Wife's first argument on appeal is that the trial court erred in denying her two oral motions for continuance made at the pre-trial conference and at the trial, respectively.

As to Former Wife's oral motion for continuance made at the pre-trial conference, this motion was made prior to the trial but was not made in writing. Florida Rule of General Practice and Judicial Administration 2.545(e) states that "[a]ll motions for continuance shall be in writing unless made at a trial." Therefore, this motion was properly denied because it was not made in writing.

As to Former Wife's motion for continuance made at the trial, we review the trial court's denial of this motion for an abuse of discretion. *Mejias v. Shelbourne*

Ocean Beach Hotel Condominiun, Inc., 78 So. 3d 17, 17 (Fla. 3d DCA 2011). In conducting that review, we consider the totality of the circumstances that were before the trial court.

In this case, Former Wife specifically agreed to the trial date. She then made an oral motion to continue the trial sixty days before trial at the pre-trial conference. The trial court properly denied that motion when it was made and informed Former Wife that the trial would proceed as scheduled. Former Wife then had sixty days to prepare for trial. The fact that she did not have an attorney was not unforeseen to her at that time, as her attorney had withdrawn three days prior to the pre-trial conference. At no time prior to the day of the trial did Former Wife file a written motion for continuance seeking additional time to hire an attorney. Knowing for sixty days that the trial was approaching, Former Wife waited until the day of the trial to seek a continuance. When she made her oral motion for continuance at the trial, she provided no specific details of the dates she attempted to hire lawyers or any explanation sufficient to justify her waiting until the day of the trial to seek a continuance. The trial court also found that Former Wife had a history of delaying the proceedings. Under these circumstances, the trial court was within its discretion to deny the motion for continuance.

Unequal Distribution of Marital Assets

Former Wife next argues that the trial court erred by allowing Former Husband to make an equalization payment using funds from his 401(k) retirement account instead of using non-retirement funds. Former Wife argues that the payment of Former Husband's equalization payment in funds from a tax-advantaged retirement account resulted in an unequal distribution of the parties' marital estate. Thus, Former Wife's argument relies on the assumption that there were tax consequences to Former Husband's use of retirement funds to make the equalization payment instead of non-retirement funds. Former Wife asserts that the trial court erred by failing to consider these tax consequences.

"Consideration of the consequences of income tax laws on the distribution of marital assets and alimony is required and failure to do so is ordinarily reversible error." *Miller v. Miller*, 625 So. 2d 1320, 1321 (Fla. 5th DCA 1993). However, a trial court is not required to consider the tax consequences of an equitable distribution decision when the parties do not present evidence of any tax consequences resulting from the decision. *Kadanec v. Kadanec*, 765 So. 2d 884, 886 (Fla. 2d DCA 2000); *Doyle v. Doyle*, 789 So. 2d 499, 504 (Fla. 5th DCA 2001) (quoting *Miller*, 625 So. 2d at 1321 n.2); *see also Tradler v. Tradler*, 100 So. 3d 735, 739 (Fla. 2d DCA 2012) ("A trial court should consider the tax consequences when valuing marital assets if a party presents expert evidence on the tax consequences.

When evidence of a tax impact is presented, it is error for the trial court to fail to consider these consequences." (quoting *Diaz v. Diaz*, 970 So. 2d 429, 432 (Fla. 4th DCA 2007) (internal quotations omitted, emphasis added)).

In this case, neither party presented any evidence regarding the tax consequences of Former Husband making the equalization payment with funds from his retirement account.[3] Therefore, the trial court did not err by failing to consider any such tax consequences.

Valuation of the Marital Home

Former Wife next argues that the trial court erred by using the date of the filing of the petition for dissolution of marriage to value the marital home. Former Wife does not dispute that the only value of the marital home presented to the trial court was the value as of the date of filing, which was $271,000. Former Wife asserts, however, that while there was no other value presented to the trial court, there was evidence presented that the value of the home increased by an unspecified amount between the date of the filing of the petition and the date of the trial. Specifically, Former Husband testified at trial that he believed the value of the home had risen since the filing date, but he did not testify as to the amount of the increase. Former Wife argues that since there was evidence that the value increased by the

[3] Attorney argument is not evidence. *See Zirkelbach Const., Inc. v. Rajan*, 93 So. 3d 1124, 1129 (Fla. 2d DCA 2012).

time of trial, even though no actual value as of the date of trial was provided to the trial court, the trial court should have either ordered a further appraisal of the home or kept open the issue of the value of the home for further evidence to be presented at a later date. We reject Former Wife's argument.

Section 61.075(7), Florida Statutes (2018), provides in pertinent part:

> The date for determining value of assets and the amount of liabilities identified or classified as marital is the date or dates as the judge determines is just and equitable under the circumstances. Different assets may be valued as of different dates, as, in the judge's discretion, the circumstances require.

We review a trial court's determination of the valuation date of an asset for abuse of discretion. *Roth v. Roth,* 312 So. 3d 1021, 1027-28 (Fla. 2d DCA 2021). Normally, "[w]hen marital assets have appreciated passively since the filing date, the date of the final hearing generally should be used. When marital assets have appreciated due to the work efforts of either party since the filing date, the filing date should be used." *Erdman v. Erdman*, 301 So. 3d 316, 319 (Fla. 5th DCA 2019) (quoting *Parry v. Parry*, 933 So. 2d 9, 14 (Fla. 2d DCA 2006)). However, the valuation of an asset must be based on competent, substantial evidence. § 61.075(3), Fla. Stat. (2018); *Blossman v. Blossman*, 92 So. 3d 878, 879 (Fla. 1st DCA 2012); *Gudur v. Gudur*, 277 So. 3d 687, 690 (Fla. 2d DCA 2019). Therefore, when the only competent, substantial evidence presented to the trial court regarding the value of a marital asset is the value as of the date of filing of the petition for dissolution,

the trial court does not err by accepting that value even if there is evidence that the value of the asset may have increased between the date of filing of the petition and the date of the trial. The trial court is not permitted to simply guess at what the value of an asset may be as of the date of trial.

Seemingly accepting this premise, Former Wife argues that the trial court should have either ordered a further appraisal of the home or kept open the issue of the value of the home for further evidence to be presented at a later date. However, that's not how trials work. If Former Wife wished to submit an appraisal of the marital home, the trial was the time to do so. She did not present an appraisal. The trial court was required to make a finding regarding the value of the marital home. § 61.075(3)(b), Fla. Stat. (2018). The only evidence presented at trial as to the value of the home was the value as of the date of the filing of the petition. Therefore, the trial court could not have chosen any other value for the home.

Similarly, Former Wife's assertion that the trial court should have kept open the issue of the value of the marital home for further evidence to be presented at a later date is essentially an argument that the trial court should have continued the trial. However, trial judges are not required to continue trials because a party fails to present evidence at the trial that the party had an opportunity to present but failed to do so.

The trial court was required to determine a value of the marital home based on competent, substantial evidence. The only competent, substantial evidence presented regarding the value of the marital home was the value as of the date of filing, $271,000. The trial court did not err by accepting that value.

Hospital Bill Incurred in February 2020

Former Wife next argues that the trial court erred by classifying a hospital bill as her nonmarital debt. Former Husband's petition for dissolution of marriage was filed on February 10, 2020. At trial, Former Wife testified that the hospital bill was incurred in February 2020, but she did not specify the date within February 2020 that the bill was incurred. No other evidence was presented regarding the date that the hospital bill was incurred. Thus, the undisputed evidence at trial established that the hospital bill was a liability incurred by Former Wife subsequent to the date of the parties' marriage. No evidence established whether Former Wife incurred the hospital bill before or after the date that Former Husband filed his petition for dissolution of marriage.

The trial court found that the bill was incurred after Former Husband filed his petition for dissolution. For that reason, the trial court classified the bill as a nonmarital liability of Former Wife. We agree with Former Wife that the trial court erred in classifying the hospital bill as nonmarital.

Section 61.075(8) states in pertinent part:

> All assets acquired and liabilities incurred by either spouse subsequent to the date of the marriage and not specifically established as nonmarital assets or liabilities are presumed to be marital assets and liabilities. Such presumption is overcome by a showing that the assets and liabilities are nonmarital assets and liabilities.

Section 61.075(7) states in pertinent part:

> The cut-off date for determining assets and liabilities to be identified or classified as marital assets and liabilities is the earliest of the date the parties enter into a valid separation agreement, such other date as may be expressly established by such agreement, or the date of the filing of a petition for dissolution of marriage.

Thus, under the first sentence of subsection (8), any liability incurred by either spouse after the date of the parties' marriage and not "specifically established as nonmarital" is presumed to be a marital liability. The party seeking to establish that a liability incurred subsequent to the date of the marriage is nonmarital has the burden to show that the liability is in fact nonmarital. Under the second sentence of subsection (8), a party may meet that burden by establishing that the liability was incurred after the applicable cut-off date set forth in subsection (7).

In this case, Former Wife presented evidence that the hospital bill was incurred subsequent to the date of the marriage when she testified that the bill was incurred in February 2020. While Former Wife established that the liability was incurred subsequent to the date of the marriage, she did so without specifically establishing that the liability was nonmarital, as she did not testify to whether the

liability was incurred before or after the applicable cut-off date, which in this case was the date of the filing of the petition for dissolution of marriage.

Under subsection (8), once Former Wife established the existence of a liability that was incurred subsequent to the date of the parties' marriage without specifically establishing that the liability was nonmarital, the liability was presumed to be a marital liability. Former Husband then bore the burden of proof to show that the liability was nonmarital by establishing that the liability was incurred after the date of the filing of the petition for dissolution. Former Husband presented no evidence that the hospital bill was incurred after February 10, 2020. For this reason, the trial court erred by classifying the hospital bill as nonmarital. We reverse this portion of the Final Judgment of Dissolution of Marriage and remand with instructions to the trial court to classify the hospital bill as a marital liability, and to adjust the equitable distribution of the parties' marital estate accordingly.[4]

[4] This case presents an uncommon evidentiary posture. In most dissolution cases involving a liability, the party establishing the existence of a liability also establishes the date that the liability was incurred or, at least, whether the liability was incurred before or after the applicable cut-off date. In that case, if the party that establishes the existence of the liability also establishes that the liability was incurred after the cut-off date (thereby specifically establishing the liability as nonmarital), the presumption set forth in subsection (8) does not apply because such a liability is not a liability that was incurred "subsequent to the date of the marriage *and not specifically established as nonmarital*." In such a case, because the party that established the existence of the liability also specifically established the liability as nonmarital, the trial court simply applies the applicable cut-off date set forth in subsection (7) and classifies the liability as nonmarital. However, in the factual circumstance presented here, where a party established that a liability was incurred

Determination of Former Husband's Income

Former Wife next argues that the trial court erred by determining that the Former Husband's gross monthly income was the income listed in his financial affidavit ($12,946 per month) plus an additional 58 cents per month (for a total monthly income of $12,946.58), even though Former Husband testified that he had additional, recurring income because he received a raise of $5,000 per year after he completed his financial affidavit.[5] We agree with Former Wife.

A financial affidavit is not competent, substantial evidence of a party's income if the party testifies that the financial affidavit is not accurate.[6] *See Addie v. Coale*, 120 So. 3d 44, 46 (Fla. 4th DCA 2013); *Fiala v. Fiala*, 333 So. 3d 215, 222 (Fla. 4th DCA 2022). In this case, Former Husband executed his financial affidavit on February 7, 2020, three days before he filed his petition for dissolution of marriage. At the trial, Former Husband testified that he received a raise of $5,000

---

subsequent to the date of the parties' marriage without specifically establishing the liability as nonmarital, the presumption set forth in subsection (8) applied and mandated that it was Former Husband's burden to show that the liability was nonmarital.

[5] The trial court found that Former Husband had an additional $7 per year in income beyond the income listed in his financial affidavit and therefore increased Former Husband's monthly income by 58 cents per month on this basis. Neither party challenges this finding on appeal.

[6] The admission of a financial affidavit into evidence is subject to the Florida Evidence Code, including §§ 90.801-90.804, Florida Statutes. In this case, neither party objected to the admission into evidence of Former Husband's financial affidavit.

per year that was not included on his financial affidavit. Thus, Former Wife is correct that Former Husband testified that his financial affidavit was not accurate.

Former Husband responds in his Answer Brief that Former Husband testified at trial that the raise was included in the financial documents that he submitted to Former Wife in discovery, which would have included Former Husband's financial affidavit. This argument is not supported by the trial transcript. Former Husband testified that the raise was reflected in documents he submitted to Former Wife, specifically in his pay stubs, but he testified that the raise was not reflected in his financial affidavit. For this reason, the trial court's finding that Former Husband's income was as reflected in his financial affidavit (plus the additional 58 cents per month) was not supported by competent, substantial evidence.

We reverse the trial court's finding of Former Husband's gross monthly income, and remand with instructions to the trial court to increase Former Husband's gross monthly income to reflect the additional $5,000 in annual income. The trial court should recalculate child support and alimony accordingly.

Former Wife also argues that the trial court erred by failing to include a $5,000 bonus in Former Husband's annual income. We do not find error in the trial court's ruling with regard to the bonus.

Trial Court's Failure to Make Specific Findings Regarding Former Wife's Need for and Former Husband's Ability to Pay Alimony

Former Wife next argues that the trial court erred with respect to the alimony award because the trial court failed to make specific findings regarding each party's net income and base its findings of need and ability to pay alimony on the parties' net incomes. Former Wife is correct.

"In determining whether to award alimony or maintenance, the court shall first make a specific factual determination as to whether either party has an actual need for alimony or maintenance and whether either party has the ability to pay alimony or maintenance." § 61.08, Fla. Stat. (2011). The parties' respective need for and ability to pay alimony must be based on the parties' net incomes. *Soria v. Soria*, 237 So. 3d 454, 460 (Fla. 2d DCA 2018) (quoting *Conlin v. Conlin*, 212 So. 3d 487, 488 (Fla. 2d DCA 2017)); *Badgley v. Sanchez*, 165 So. 3d 742, 744 (Fla. 4th DCA 2015) ("The judgment is also deficient for failing to look to the parties' net incomes in assessing need and ability to pay."); *Ogle v. Ogle*, 334 So. 3d 699, 702 (Fla. 1st DCA 2022) ("To determine a party's ability to pay, net income (after expenses), not gross, must be considered."); *Kirby v. Kirby*, 345 So. 3d 356, 357 (Fla. 5th DCA 2022) ("[I]t appears that the trial court relied on Former Husband's gross income when calculating his alimony obligation. This is reversible error.").[7]

[7] Section 61.08(9), Florida Statutes, states that "[t]he award of alimony may not leave the payor with significantly less net income than the net income of the

The final judgment in this case does not include specific findings as to either party's net income. The trial court also did not make specific findings regarding the parties' net incomes on the record at trial. The trial court did find in the final judgment that it was appropriate to impute income to Former Wife in the amount of $32,000.00 per year, but the trial transcript makes it clear that this was a finding of gross income, not net income.[8] The trial court's failure to make specific findings regarding the parties' net incomes necessitates reversal of the alimony award.

Former Husband argues in his Answer Brief that the trial court did make "specific findings" because: (1) the final judgment includes findings regarding the factors set forth in Section 61.08(2); (2) the parties' financial affidavits included the parties' net income amounts; and (3) the trial court made findings regarding the parties' need and ability to pay. We reject all three arguments.

First, while a trial court must consider the factors set forth in Section 61.08(2) before making an alimony award, a trial court must first determine whether either party has a need for alimony and whether the other party has the ability to pay alimony. *See Ogle*, 334 So. 3d at 702. The findings of need and ability to pay must

---

recipient unless there are written findings of exceptional circumstances." This provision supports the requirement that a trial court make specific findings regarding the parties' net incomes. Without such findings, there is no way the trial court could confirm that its alimony award complies with Section 61.08(9).

[8] Neither party challenges on appeal the trial court's imputation of income to Former Wife.

be based on the parties' net incomes. Only after the trial court determines need and ability to pay based on the parties' net incomes does the trial court then consider the factors set forth in Section 61.08(2) to determine the appropriate alimony award. *Id*. Consideration of the factors in Section 61.08(2) certainly cannot substitute for the trial court's antecedent obligation to determine need and ability to pay based on the parties' net incomes.

Second, the admission into evidence of the parties' financial affidavits simply does not constitute a finding by the trial court of the parties' net incomes. Neither the final judgment nor the trial court's oral ruling at the trial include a finding that the parties' net incomes were as stated in their financial affidavits. Indeed, the only income amount from a party's financial affidavit mentioned by the trial court in either the final judgment or its oral ruling was the gross income amount listed by Former Husband in his financial affidavit. Both the trial court's written final judgment and oral ruling are devoid of the required specific findings regarding the parties' net incomes.

Third, as the cases cited above demonstrate, a general finding of need and ability to pay are not sufficient to support an award of alimony. A trial court must make specific findings regarding each party's net income and the findings of need and ability to pay must then be based on the parties' net incomes. *See Ogle*, 334 So. 3d at 703 ("In its order, the trial court makes general references to the former wife's

need and the former husband's ability to pay, but it does not make any specific findings as to how it calculated their respective net income or how it otherwise reached its conclusion about the award of alimony to the former wife."). Specific findings regarding the parties' net incomes are necessary to permit meaningful appellate review. *See McCants v. McCants*, 984 So. 2d 678, 682 (Fla. 2d DCA 2008) ("[M]eaningful appellate review is hampered by the absence of findings as to how the trial court determined the income amount.").

In sum, we agree with Former Wife that the trial court's failure to make specific findings regarding the parties' net incomes requires reversal of the alimony award. On remand, the trial court must set out specifically its calculations of net income for the parties and demonstrate how that net income is utilized to determine the amount of alimony. *See Ogle*, 334 So. 3d at 703.

Trial Court's Failure to Award Attorneys' Fees to Former Wife

Former Wife next argues that the trial court erred by failing to award Former Wife attorneys' fees pursuant to section 61.16, Florida Statutes. Since Former Wife did not present at the final hearing any billing statements or specific evidence of any attorneys' fees she incurred, we find no error in the trial court's denial of her request for attorneys' fees.[9] We express no view regarding the remaining arguments made

[9] The trial court denied a final award of attorneys' fees after Former Wife failed to present billing entries or other specific evidence of any attorneys' fees she

by Former Wife with respect to attorneys' fees. This opinion is without prejudice to Former Wife seeking attorneys' fees in the trial court for any proceedings conducted on remand.

CONCLUSION

We remand this case to the trial court for further proceedings consistent with this opinion. On remand, the trial court may determine whether it requires an additional evidentiary hearing to comply with this opinion or whether the evidence in the record from the final hearing is sufficient for the trial court to enter an amended final judgment that complies with this opinion without the necessity of an additional evidentiary hearing.

AFFIRMED in part; REVERSED in part; and REMANDED with instructions.

COHEN and NARDELLA, JJ., concur.

Edward E. Emrick IV, of DeWitt Law Firm, P.A., Orlando, for Appellant.

Mark A. Sessums, of Sessums Law Group, P.A., Lakeland, for Appellee.

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF TIMELY FILED

---

incurred during the litigation. We do not intend to imply that such specific evidence would have been required to seek an award of temporary attorneys' fees.